UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

YAYA DIALLO,	:	**No. 3:25-CV-1724**
Petitioner	:	
	:	**(Latella, M.J.)**
v.	:	
	:	
CRAIG LOWE, et al.,	:	
Respondents	:	**Filed Electronically**

RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

This is a habeas action filed by Petitioner Yaya Diallo, an undocumented alien, who is currently in separate removal proceedings before the Executive Office of Immigration Review Immigration Court and challenges his temporary detention while the decision is made regarding his removal.

Numerous provisions of 8 U.S.C. §1252 deprive this Court of jurisdiction to review petitioner's claims and preclude this Court from granting the relief he seeks, release. Congress has unambiguously stripped federal courts of jurisdiction over challenges to the commencement of removal proceedings, including detention pending removal proceedings. Congress further directed that any challenges arising from any removal-related activity—including detention pending removal proceedings—must be brought before the appropriate court of appeals, not a district court. Also, this Court cannot provide any relief that would restrain the operation of Sections 1225(b)(2) or 1226(a). However, that is exactly what the petitioner is

requesting here. As such, this Court should dismiss petitioner's Amended Petition on jurisdictional grounds.

Even if these jurisdictional hurdles could be overcome, the Amended Petition should still be denied as petitioner is challenging a lawfully enacted regulation (8 C.F.R. § 1003.19(i)(2)) authorizing his detention through an automatic stay, but critically, that automatic stay merely implements detention Congress authorized under 8 U.S.C. § 1225(b)(2). Therefore, to grant his habeas petition, petitioner asks this Court to set aside a lawfully enacted regulation and statute, finding both unconstitutionally applied, as alleged violations of the Due Process Clause of the United States Constitution. But as discussed below, the Supreme Court has long recognized Congress's broad power and immunity from judicial control to expel aliens from the country and to detain them while doing so. *See e.g., Shaughnessy v. United States*, 345 U.S. 206, 210 (1953); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). The United States' temporary detention of petitioner in no way exceeds this broad authority and does not deprive petitioner of due process. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process."). Because petitioner's temporary detention is lawful, his habeas petition fails.

II. Background

A. Factual and procedural history

The petitioner is a native and citizen of Mauritania who unlawfully entered the United States from Mexico and encountered border patrol agents at Lukeville, Arizonia on or about August 3, 2023. (Ex. 1, Record of Deportable/Inadmissible Alien (Form I-213), at pp. 1-2.) Because petitioner was an alien who entered the United States without inspection or admission and was deemed inadmissible at that time, the Department of Homeland Security (DHS) had the discretion to either place him into removal proceedings under 8 U.S.C. §1229a or issue an expedited removal order. Due to resource constraints, DHS opted to place petitioner into Section 1229a removal proceedings and release him that same day on his own recognizance. (Ex. 2, Notice of Custody Determination (Form I-286).)

On June 18, 2025, petitioner was detained by DHS and issued a Notice to Appear, charging him as removable pursuant to 8 U.S.C. §1182(a)(6)(A)(i) because he entered the country without inspection. (Ex. 3, Notice of Custody Determination (Form I-286); Ex. 4, Notice to Appear (Form I-862).) On July 13, 2025, petitioner was also charged as removable pursuant to 8 U.S.C. §1182(a)(7)(A)(i)(I) because he was not in possession of a valid document as required by the Attorney General. (Ex. 5, Additional Charges of Inadmissibility/Deportability (Form I-261).)

A bond hearing was held on July 28, 2025. (Ex. 6, IJ Order.) At the hearing, DHS argued petitioner was an applicant for admission under 8 U.S.C. §1225(a)(1) and was ineligible for bond. (Doc. 8 (Amended Petition) at ¶ 20.) The immigration judge disagreed and ordered petitioner to be released on bond in the amount of $7,500.00. (Ex. 6, IJ Order.)

That same day, DHS filed its notice of intent to appeal the custody determination, triggering the automatic stay of petitioner's release on bond pursuant to 8 C.F.R. §1003.19(i)(2). (Ex. 7, Notice of ICE Intent to Appeal Custody Redetermination (Form EOIR-43).) DHS filed a formal Notice of Appeal with the Board of Immigration Appeals (BIA) on August 6, 2025. (Ex. 8, Notice of Appeal (Form EOIR-26).)

The automatic stay will cease upon a decision of the BIA or 90 days, whichever is shorter. *See* 8 C.F.R. §1003.6(c)(4).

On September 19, 2025, the BIA remanded the record back to the immigration judge to determine whether she has jurisdiction over petitioner's request for custody redetermination in light of its decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 226 (BIA 2025) because it held "that under the plain language reading of the INA, Immigration Judges lack authority to hear bond requests or grant bond to aliens who are present in the United States without admission." (Ex. 10, BIA decision.)

Petitioner's merits hearing was scheduled for September 26, 2025, but has since been rescheduled to November 14, 2025. (Doc. 8 (Amended Petition) at ¶ 30.)

Petitioner challenges his temporary detention pursuant to the automatic stay through this habeas action against respondents Craig Lowe, warden of Pike County Correctional Facility; Kristi Noem, Secretary of the United States DHS; Pamela Bondi, Attorney General of the United States; Todd Lyons, Acting Director United States Immigration and Customs Enforcement (ICE); and Brian McShane, acting Philadelphia Field Office Director of ICE. (Doc. 8 (Amended Petition).) By September 19, 2025 order, this Court directed the respondents to respond to the petition within seven days of the order, or on or before September 26, 2025. (Doc. 3 (Order to Show Cause).) Respondents filed their response timely. (Doc. (Response to Petition).) Then, on September 30, 2025, Petitioner filed the Amended Petition. (Doc. 8 (Amended Petition).) The Court then directed respondents to respond to the Amended Petition by October 23, 2025. (Doc. 10 (Order to Show Cause).) This response is filed in accordance with that order.

B. Legal background for individuals seeking admission to the United States

For more than a century, this country's immigration laws have authorized immigration officials to charge noncitizens as removable from the country, arrest noncitizens subject to removal, and detain noncitizens during removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960). "The rule has been clear for

decades: '[d]etention during deportation proceedings [i]s ... constitutionally valid.'" *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024) (quoting *Demore v. Kim*, 538 U.S. 510, 523 (2003)), *rehearing by panel and en banc denied*, *Banyee v. Bondi*, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025); *see Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Demore*, 538 U.S. at 523 n.7 ("In fact, prior to 1907 there was no provision permitting bail for *any* [noncitizens during the pendency of their deportation proceedings."). Indeed, removal proceedings "'would be [in] vain if those accused could not be held in custody pending the inquiry into their true character.'" *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Congress has enacted a multi-layered statutory scheme for the civil detention of noncitizens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. It is the interplay between these statutes that is at issue here.

i. Inspection and detention under 8 U.S.C. § 1225

"To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). Section 1225 governs inspection, the initial step in this process, *id.*, stating that all noncitizen "applicants for admission . . . shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3). The statute—in a

provision entitled "ALIENS TREATED AS APPLICANTS FOR ADMISSION"—dictates who "shall be deemed for purposes of this chapter an applicant for admission," defining that term to encompass *either* a noncitizen "present in the United States who has not been admitted *or* [one] who arrives in the United States . . . ." *Id.* § 1225(a)(1) (emphasis added).

Paragraph (b) of the Section 1225 governs the inspection procedures applicable to all applicants for admission. They "fall into one of two categories, those covered by Section 1225(b)(1) and those covered by Section 1225(b)(2)." *Jennings*, 583 U.S. at 287.

Section 1225(b)(1) applies to those "arriving in the United States" and "certain other"[1] noncitizens "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Jennings*, 583 U.S. at 287. Noncitizens falling under this subsection are generally subject to expedited removal proceedings "without further hearing or review." *See id.* § 1225(b)(1)(A)(i). But where the applicant "indicates an intention to apply for asylum . . . or a fear of

[1] The "certain other" noncitizens referred to are addressed in Section 1225(b)(1)(A)(iii), which gives the Attorney General sole discretion to apply (b)(1)'s expedited procedures to a noncitizen who "has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that [he or she] has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility," subject to an exception inapplicable here. The statute therefore explicitly confirms application of its inspection procedures for those already in the country, including for a period of years.

persecution," immigration officers will refer him or her for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An applicant "with a credible fear of persecution" is "detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii). If the he or she does not indicate an intent to apply for asylum, express a fear of persecution, or is "found not to have such a fear," he or she is detained until removal from the United States. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

Section 1225(b)(2) is "broader" than (b)(1), "serv[ing] as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." *Jennings*, 583 U.S. at 287 (citing 8 U.S.C. § 1225(b)(1)). Subject to exceptions not applicable here, "if the examining immigration officer determines that [the noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] *shall* be detained for a [removal] proceeding[.]" 8 U.S.C. § 1225(b)(2)(A) (emphasis added); *see also Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) ("for [noncitizens] arriving in and seeking admission into the United States who are placed directly in full removal proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), mandates detention 'until removal proceedings have concluded.'") (citing *Jennings*, 583 U.S. at 299). DHS retains sole discretionary authority to temporarily release on parole "any alien applying for admission" on a "case-by-case basis for urgent humanitarian reasons or significant

public benefit." 8 U.S.C. § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

ii. Apprehension and discretionary detention under 8 U.S.C. § 1226(a)

"Even once inside the United States, [noncitizens] do not have an absolute right to remain here. For example, [a noncitizen] present in the country may still be removed if he or she falls 'within one or more . . . classes of deportable aliens.' §1227(a)." *Jennings*, 583 U.S. at 288 (citing 8 U.S.C. § 1227(a), which outlines "classes of deportable aliens" among those already "in *and admitted* to the United States") (emphasis added)). "Section 1226 generally governs the process of arresting and detaining that group of [noncitizens] pending their removal." *Id.* Applicable "[o]n a warrant issued by the Attorney General," it provides that a noncitizen may be arrested and detained pending a decision" on the removal. 8 U.S.C. § 1226(a). For noncitizens arrested under Section 1226(a), the Attorney General and the DHS have broad discretionary authority to detain a noncitizen

during removal proceedings.[2] *See* 8 U.S.C. § 1226(a)(1) (DHS "may continue to detain the arrested" noncitizen during the pendency of removal proceedings).

Following apprehension under Section 1226(a), a DHS officer makes an initial discretionary determination concerning release. *See* 8 C.F.R. § 236.1(c)(8). DHS "may continue to detain the" noncitizen. 8 U.S.C. § 1226(a)(1). "To secure release, the [noncitizen] must show that he does not pose a danger to the community and that he is likely to appear for future proceedings." *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999)).

If DHS decides to release the noncitizen, it may set a bond or condition his release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8). If DHS determines that a noncitizen should remain detained during the pendency of his removal proceedings, he may request a bond hearing before an immigration judge, within the Department of Justice's Executive Office for Immigration Review. *See* 8 C.F.R.

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[2] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General's authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain, or authorize bond for noncitizens under section 1226(a) is "one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings." *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

§§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge conducts a bond hearing and decides whether release is warranted, based on a variety of factors that account for his ties to the United States and the possible risks of flight or danger to the community. *See Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (identifying nine non-exhaustive factors); 8 C.F.R. § 1003.19(d) ("The determination . . . as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].").

Section 1226(a) does not grant "any *right* to release on bond." *Matter of D-J-* , 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor does it address the applicable burden of proof or particular factors that must be considered. *See generally* 8 U.S.C. § 1226(a). Rather, it grants DHS and the Attorney General broad discretionary authority to determine, after arrest, whether to detain or release a noncitizen during his removal proceedings. *See id.* If, after the bond hearing, either party disagrees with the decision of the immigration judge, that party may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

Included within the Attorney General and DHS's discretionary authority are limitations on the delegation to the immigration court. Under 8 C.F.R. § 1003.19(h)(2)(i)(B), the immigration judge does not have authority to redetermine the conditions of custody imposed by DHS for any arriving alien. The regulations

also include a provision that allows DHS to invoke an automatic stay of any decision by an immigration judge to release an individual on bond when DHS files an appeal of the custody redetermination. 8 C.F.R. § 1003.19(i)(2) ("The decision whether or not to file [an automatic stay] is subject to the discretion of the Secretary.").

iii. Review of custody determinations at the BIA

The BIA is an appellate body within the Executive Office for Immigration Review (EOIR). *See* 8 C.F.R. § 1003.1(d)(1). Members of the BIA possess delegated authority from the Attorney General. 8 C.F.R. § 1003.1(a)(1). The BIA is "charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it," including immigration judge custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1; 1236.1. The BIA not only resolves particular disputes before it, but also "through precedent decisions, [it] shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." *Id.* § 1003.1(d)(1). "The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General." 8 C.F.R. § 1003.1(d)(7).

If an automatic stay is invoked, regulations require the BIA to track the progress of the custody appeal "to avoid unnecessary delays in completing the record for decision." 8 C.F.R. § 1003.6(c)(3). The stay lapses in 90 days, unless the

detainee seeks an extension of time to brief the custody appeal, 8 C.F.R. § 1003.6(c)(4), or unless DHS seeks, and the BIA grants, a discretionary stay. 8 C.F.R. § 1003.6(c)(5).

If the BIA denies DHS's custody appeal, the automatic stay remains in effect for five business days. 8 C.F.R. § 1003.6(d). DHS may, during that five-day period, refer the case to the Attorney General under 8 C.F.R. § 1003.1(h)(1) for consideration of the case. *Id.* Upon referral to the Attorney General, the individual's release is stayed for 15 business days while the case is considered. The Attorney General may extend the stay of release upon motion by DHS. *Id.*

Here, the automatic stay has been in place for approximately two months and will end either with a BIA decision or 90 days, whichever is shorter.

III. Argument

A. Standard of review

In a petition for a writ of habeas corpus, the petitioner is challenging the legality of his restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Specifically, here, petitioner challenges his temporary civil immigration detention pending his removal proceeding.

Judicial review of immigration matters, including of detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-*

Arab Anti-Discrimination Comm., 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"). The Supreme Court has thus "underscore[d] the limited scope of inquiry into immigration legislation," and "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while

arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.")

B. This Court does not have jurisdiction over petitioner's claims; therefore, it should dismiss the Amended Petition.

As a threshold matter, 8 U.S.C. §§ 1252(g) and (b)(9) preclude review of petitioner's claims. *First,* Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] *commence proceedings*, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title."[3] Except as provided in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

[3] Congress initially passed Section 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended Section 1252(g) by adding "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law." REAL ID Act of 2005, Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

Section 1252(g) also bars district courts from hearing challenges to the *method* by which the Secretary of DHS chooses to commence removal proceedings, including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take [plaintiff] into custody and to detain him during removal proceedings").

Petitioner's claims stem from his detention during removal proceedings. That detention arises from the decision to commence such proceedings. *See, e.g.*, *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) ("The decision to detain plaintiff until his hearing before the Immigration Judge arose from this decision to commence proceedings[.]"); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020) (holding that 8 U.S.C. § 1252(g) and (b)(9) deprive district court of jurisdiction to review action to execute removal order).

As other courts have held, "[f]or the purposes of § 1252, the Attorney General commences proceedings against an alien when the alien is issued a Notice to Appear before an immigration court." *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008). "The Attorney

General may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings." *Id.* at *3. "Thus, an alien's detention throughout this process arises from the Attorney General's decision to commence proceedings" and review of claims arising from such detention is barred under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g). As such, judicial review of the claim that petitioner is entitled to bond is barred by Section 1252(g), so this Court should dismiss the Amended Petition for lack of jurisdiction.

Second, under Section 1252(b)(9), "judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States" is only proper before the appropriate federal court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, Section 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated to any removal action or proceeding" is it within the district court's jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a "primary effect" of the REAL ID Act is to "limit all aliens to one bite of the apple" (internal quotation marks omitted)).

Critically, "[Section] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d

Cir. 2008) ("[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]"). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and "receive their day in court." *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law.").

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the "decision to detain [an alien] in the first place or to seek removal[.]"). Here, Petitioner challenges the government's decision and action to detain, which arises from DHS's decision to commence removal proceedings against an arriving alien and is thus an "action taken . . . to remove [them] from the United States." *See* 8 U.S.C. § 1252(b)(9); *see also, e.g.*, *Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not

bar review in that case because the petitioner did not challenge "his initial detention"); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government's decision to "commence proceedings"). As such, this Court lacks jurisdiction over this action.

The reasoning in *Jennings* outlines why petitioner's claims are unreviewable here. While holding that it was unnecessary to comprehensively address the scope of Section 1252(b)(9), the Supreme Court in *Jennings* also provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that "§1252(b)(9) [did] not present a jurisdictional bar" in situations where "respondents . . . [were] not challenging the decision to detain them in the first place." *Id.* at 294–95. In this case, petitioner *does* challenge the government's decision to detain him in the first place. Though petitioner may attempt to frame this challenge as one relating to detention authority, rather than a challenge to DHS's decision to detain him pending his removal proceedings in the first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

Indeed, the fact that petitioner is challenging the basis upon which he is detained is enough to trigger Section 1252(b)(9) because "detention *is* an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. 318, 319 (Thomas, J.,

concurring); 8 U.S.C. § 1252(b)(9). This Court should also dismiss the Amended Petition for lack of jurisdiction under Section 1252(b)(9). Petitioner must present his claims before the appropriate federal court of appeals because they challenge the government's decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9).

C. Alternatively, if this Court exercises jurisdiction over the Amended Petition, petitioner is lawfully detained.

If this Court determines it has jurisdiction here, then still it should deny the Amended Petition because petitioner is lawfully detained.

Petitioner's temporary detention pursuant to the automatic stay of 8 C.F.R. § 1003.19(i)(2) is reinforced by Congress's command to detain him throughout his removal proceedings pursuant to 8 U.S.C. § 1225(b)(2). Moreover, this temporary detention does not violate due process. Because petitioner cannot meet his burden of demonstrating his temporary detention violates the law, his Amended Petition must be denied. *See* 28 U.S.C. § 2241.

The current operative mechanism of petitioner's detention is an automatic stay of release on bond for a maximum of 90 days under 8 C.F.R. § 1003.19(i)(2), but this confinement is statutorily authorized by 8 U.S.C. § 1225(b)(2), which requires detention throughout his entire removal proceedings.

Pursuant to 8 U.S.C. § 1225(b)(2)(A), "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an

alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A). The Supreme Court has held that 8 U.S.C. § 1225(b)(2)(A) is a mandatory detention statute and that aliens detained pursuant to that provision are not entitled to bond. *Jennings*, 583 U.S. at 287 ("Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens.").

Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory detention requirement as he is an "applicant for admission" to the United States. As described above, an "applicant for admission" is an alien present in the United States who has not been admitted. 8 U.S.C. § 1225(a)(1). Congress's broad language here is unequivocally intentional—an undocumented alien is to be "deemed for purposes of this chapter an applicant for admission." *Id.* Petitioner is "deemed" an applicant for admission based on his failure to seek lawful admission to the United States before an immigration officer, which has not been disputed. *See generally* Doc. No. 1. And because petitioner has not demonstrated to an examining immigration officer that he is "clearly and beyond a doubt entitled to be admitted," his detention is mandatory.[4] 8 U.S.C. § 1225(b)(2)(A). Thus, the petitioner is

[4] Petitioner remains an applicant for admission, notwithstanding his prior release on his own recognizance pursuant to 8 U.S.C. §1226(a)(2)(B), which allowed his temporary release from detention and is the stated basis on the arrest warrant for petitioner's current detention. (Ex. 3, Notice of Custody Determination (Form I-286).) "[A]n alien who tries to enter the country illegally is treated as an 'applicant

properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that he "shall be" detained.

This reasoning is supported by the Supreme Court, which has confirmed an alien present in the country but never admitted is deemed "an applicant for admission" and that "detention must continue" "until removal proceedings have concluded" based on the "plain meaning" of 8 U.S.C. § 1225. *Jennings v.* 583 U.S. at 289 & 299. At issue in *Jennings* was the statutory interpretation. The Supreme Court reversed the Ninth Circuit Court of Appeal's imposition of a six-month detention time limit into the statute. *Id.* at 297. The Court clarified there is no such limitation in the statute and reversed on these grounds, remanding the constitutional due process claims for initial consideration before the lower court. *Id.*

Applying this reasoning, the United States District Court for the District of Massachusetts recently confirmed in a habeas action that an unlawfully present alien, who had been unlawfully present in the country for approximately 20 years, was nonetheless an "applicant for admission" upon the straightforward application of the

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for admission,' §1225(a)(1), and an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'" *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020). Applicants for admission are "treated, for constitutional purposes, as if stopped at the border," *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (internal quotation marks omitted), even if they are paroled into the United States for a limited purpose, *see United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 235 (2d Cir. 1967) ("A 'parolee,' even though physically in the country, is not regarded as having 'entered' and thus has not acquired the full protection of the Constitution.").

statute. *See Webert Alvarenga Pena, Petitioner, v. Patricia Hyde, et al., Respondents.*, No. CV 25-11983-NMG, 2025 WL 2108913 (D. Mass. July 28, 2025). The Court explained this resulted in the "continued detention" of an alien during removal proceedings as commanded by statute. *Id.*

The precise issue - Section §1225's application - has now been resolved by the BIA. Indeed, Section 1225 applies to aliens who are present in the country *even for years* and who have not been admitted. *See Matter of Yajure Hurtado*, 29 I&N Dec. 216, 226 (BIA 2025) ("the statutory text of the INA . . . is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status." (citing 8 U.S.C. §1225)).

In *Hurtado*, the BIA affirmed the decision of the immigration judge finding the Immigration Court lacked jurisdiction to conduct a bond hearing because the alien who was present in the United States for almost three years but was never admitted shall be detained under 8 U.S.C. §1225 for the duration of his removal proceedings. *Id.* The case involved an alien who unlawfully entered the United States in 2022 and was granted temporary protected status in 2024. *Id.* at 216-17. However, that status was revoked in 2025, and the alien was subsequently apprehended and placed in removal proceedings. *Id.* at 217. It is clear from the decision, the alien was initially served with a Notice of Custody Determination,

informing him of his detention under 8 U.S.C. § 1226 and his ability to request bond, like the petitioner was in this case. *Id.* at 226. However, when the alien sought a redetermination of his custody status, the immigration judge held the Court did not have jurisdiction under Section 1225. *Id.* at 216. The alien appealed to the BIA. *Id.*

In affirming the decision of the immigration judge who determined he lacked jurisdiction, the BIA found Section 1225 clear and unambiguous as explained above. Thus, because the alien was present in the United States (regardless of how long) and he was never admitted, he shall be detained during his removal proceedings. *See id.* at 228.

Also, the BIA rejected the alien's argument that the mandatory detention scheme under § 1225 rendered the recent amendment to § 1226 under the Laken Riley Act superfluous. *Id.* The BIA explained, "nothing in the statutory text of section 236(c), including the text of the amendments made by the Laken Riley Act, purports to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute "shall be detained for [removal proceedings]." *Id.* at 222. The BIA explained further that any redundancy between the two statutes does not give license to "rewrite or eviscerate" one of the statutes. *See id.* (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)).

The BIA additionally reasoned that it matters not that the alien was initially served with a warrant listing Section 1226 and informing him of his ability to seek bond. *See id.* at 226-27. Rather, the BIA explained that the Immigration Court cannot bestow jurisdiction upon itself with that initial paperwork when said jurisdiction has been specifically revoked by Congress in § 1225. *Id.* (explaining "the mere issuance of an arrest warrant does not endow an immigration judge with authority to set bond for an alien who falls under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A).") The BIA further pointed out, "[o]ur acknowledgement that 'aliens detained under section 236(a) may be eligible for discretionary release on bond' does not mean that *all* aliens detained while in the United States with a warrant of arrest are detained under section 236(a) and entitled to a bond hearing before the Immigration Judge, regardless of whether they are applicants for admission under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A)." *Id.* at 227. Thus, the BIA rejected this and every argument raised by the alien to find Section 1225 applied to him despite residing in the country for years. *Id.*

So now, the BIA mandate is clear: "under a plain language reading of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), Immigration Judges lack authority to hear bond requests or to grant bond to aliens, like the respondent, who are present in the United States without admission." *Id.* at 225. Indeed, this ruling

emphasizes that § 1225 applies to aliens like the petitioner who is also present in the United States but has not been admitted.

The operative automatic stay of release pending appeal at issue in this case merely ensures that DHS has an opportunity to vindicate Congress's mandatory detention scheme. Because petitioner shall be detained during removal proceedings and the proceedings are uncontrovertibly ongoing, the temporary detention is lawful. As such, this Court should reject petitioner's argument that Section 1226(a) governs his detention instead of Section 1225(b)(2).[5]

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[5] If this Court would determine that petitioner is detained pursuant to Section 1226(a), he would be required to exhaust his challenges to his detention in immigration court and at the BIA before bringing those challenges in federal court. While it is true that "[t]here is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention [in federal court]," *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014), "[a] habeas petitioner generally must exhaust administrative remedies before seeking federal court intervention," *Monestime v. Reilly*, 704 F. Supp. 2d 453, 456 (S.D.N.Y. 2010). "Under the doctrine of exhaustion of administrative remedies, 'a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.'" *Howell v. I.N.S.*, 72 F.3d 288, 291 (2d Cir. 1995) (*quoting Guitard v. United States Sec'y of Navy*, 967 F.2d 737, 740 (2d Cir. 1992)); *Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004) ("We have been nothing if not clear in requiring that a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.") (internal quotation marks omitted); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 819 (9th Cir. 2003) (a petitioner "must exhaust administrative remedies before raising . . . constitutional claims in a habeas petition when those claims are reviewable by the BIA on appeal"); *cf. Ceballos v. Ridge*, No. 04 Civ. 7304 (LAK), 2004 WL 2849604, at *2 (S.D.N.Y. 2004) (alien's request for release from custody was unexhausted and would not be considered by district court); *Diaz v. McElroy*, 134 F. Supp. 2d 315, 319-20 (S.D.N.Y. 2001) (claim unexhausted where petitioner failed to appeal custody

D. Petitioner's temporary detention does not offend due process.

As mentioned above, Congress broadly crafted "applicants for admission" to include undocumented aliens present within the United States like petitioner. *See* 8 U.S.C. § 1225(a)(1). And Congress directed aliens like the petitioner to be detained during their removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *Jennings*, 583 U.S. at 297 ("Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded."). In so doing, Congress made a legislative judgment to detain undocumented aliens during removal proceedings, as they—by definition—have crossed borders and traveled in violation of United States law. And as explained above, that is the prerogative of the legislative branch serving the interest of the Government and the United States.

The Supreme Court has recognized this profound interest. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). And with this power to remove aliens, the Supreme Court has recognized the United

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decision by INS District Director to BIA). Indeed, judicial exhaustion "serves myriad purposes, including limiting judicial interference in agency affairs, conserving judicial resources, and preventing the frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency." *See Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (internal quotation marks omitted).

States' longtime Constitutional ability to detain those in removal proceedings. *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process."); *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) ("Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made.").

In another immigration context (aliens already ordered removed awaiting their removal), the Supreme Court has explained that detaining these aliens less than six months is presumed constitutional. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). But even this presumptive constitutional limit has been subsequently distinguished as perhaps unnecessarily restrictive in other contexts. For example, in *Demore*, the Supreme Court explained Congress was justified in detaining aliens during the entire course of their removal proceedings who were convicted of certain

crimes. 538 U.S. at 513. In that case, similar to undocumented aliens like Petitioner, Congress provided for the detention of certain convicted aliens during their removal in 8 U.S.C. § 1226(c). *See id.* The Court emphasized the constitutionality of the "definite termination point" of the detention, which was the length of the removal proceedings. *Id.* at 512 ("In contrast, because the statutory provision at issue in this case governs detention of deportable criminal aliens *pending their removal proceedings,* the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings. Second, while the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," *id.,* at 690–691, 121 S.Ct. 2491, the record shows that § 1226(c) detention not only has a definite termination point, but lasts, in the majority of cases, for less than the 90 days the Court considered presumptively valid in *Zadvydas*.").[6] In light of Congress's interest in dealing with illegal immigration by keeping specified aliens in detention pending the removal period, the Supreme Court dispensed of any Due Process concerns without engaging in the "*Mathews v. Eldridge* test" *See id. generally.*

Following this precedent, the United States District Court for the District of Massachusetts (case mentioned above) dismissed a habeas action, finding that it was

[6] In 2018 the Court again highlighted the significance of a "definite termination point" for detention of certain aliens pending removal. *See Jennings v. Rodriguez*, 583 U.S. 281, 304 (2018).

not a violation of due process to detain an undocumented alien during the course of his removal proceedings. *See Webert Alvarenga Pena, Petitioner, v. Patricia Hyde, et al., Respondents.*, No. CV 25-11983-NMG, 2025 WL 2108913, at *1 (D. Mass. July 28, 2025) (highlighting the petitioner had been detained for 17 days leading up to the court's decision, far less than other detention times found constitutional in other cases).

Likewise, petitioner's temporary detention pending his removal proceedings does not violate due process. He has been detained for roughly two months after the bond redetermination hearing as his *process* continues to unfold, which began with his arrest and the immigration officer's initial custody determination. Thus, in the present case, when DHS (ICE) asserted mandatory detention pursuant to 8 U.S.C. § 1225(b) at the bond redetermination hearing, the immigration judge could have considered and should have recognized that she did not have jurisdiction to set a bond under 8 U.S.C. § 1226(a).

Nevertheless, this matter has now been determined by the BIA. In *Hurtado*, the BIA affirmed "the Immigration Judge's determination that he did not have authority over [a] bond request because aliens who are present in the United States without admission are applicants for admission as defined under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings." 29 I. & N. Dec. 216, 220 (BIA 2025).

This Court should consider that the only significant factual difference in the present case from that presented in *Hurtado* is the fact that the immigration judge in this case failed to accept DHS's argument at the bond redetermination hearing that the immigration judge did not have jurisdiction under Section 1225, necessitating DHS's invocation of the automatic stay pursuant to a regulation. Based upon the BIA's decision in *Hurtado*, the immigration judge's decision granting this petitioner a bond is likely to be reversed soon. Therefore, Section 1225 lawfully applies and the invocation of the automatic stay becomes irrelevant.

Indeed, petitioner's arguments that the automatic stay violates Due Process weakens when it is likely the immigration judge erred in authorizing the release to begin with because Section 1225 called for mandatory detention. Indeed, the BIA has remanded the record back to the immigration judge to determine whether she has jurisdiction over petitioner's request for custody redetermination. (Ex. 10, BIA decision.) Moreover, the respondents have an enormous interest in its use of detention, particularly in the context of immigration proceedings, and Congress and the Supreme Court have historically agreed. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.").

Further, petitioner's next removal hearing is before the immigration judge on November 14, 2025. (Doc. 8 at ¶ 30 (Amended Petition).) Resolution one way or

another is undoubtedly forthcoming. Petitioner's ample available process in his current removal proceedings demonstrate no lack of procedural due process—nor any deprivation of liberty "sufficiently outrageous" required to establish a substantive due process claim. *See generally Reed v. Goertz*, 598 U.S. 230, 236 (2023); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 628 (8th Cir. 2001), *as corrected* (Mar. 27, 2001), *as corrected* (May 1, 2001). Congress simply made the decision to detain him pending removal which is a "constitutionally permissible part of that process." *See Demore v. Kim*, 538 U.S. 510, 531 (2003).

The United States is aware of prior district court rulings outside this Commonwealth in which the court held that the automatic stay provision violates due process. *See Mohammed H. v. Trump*, No. CV 25-1576 (JWB/DTS), 2025 WL 1692739, at *5 (D. Minn. June 17, 2025), *Aguilar Maldonado v. Olson*, No. 25-cv-3142, 2025 WL 2374411, at *9-14 (D. Minn Aug. 15, 2025); *Jacinto v. Trump*, No. 4:25CV3161, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Leal-Hernandez v. Noem*, No. 1:24-cv-02428, 2025 WL 2430025 (D. Md. Aug. 24, 2025).[7] In light of *Hurtado* and the BIA's finding that the immigration court does not have the authority over a

[7] Petitioner also cites *Gunaydin v. Trump*, No. 25-CV-01151 (JMB/DLM), 2025 WL 1459154, at *6 (D. Minn. May 21, 2025). (Doc. 1 (Petition) at ¶¶29, 31-33.) The question presented by the Petition was distinct: "whether a regulation can permit an agency official to unilaterally detain a person after a judge has ordered the person's release and after a judge has dismissed the underlying proceedings." The court's decision was heavily dependent on the fact that Gunaydin's proceedings had been terminated—a critical fact not present here.

bond request because aliens present in the United States without admission are applicants for admission and subject to detention during their removal proceedings in accordance with Section 1225(b)(2)(A), the automatic stay provision is irrelevant. *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 220 (BIA 2025).

Moreover, respondents have an enormous interest in its use of detention, particularly in the context of immigration proceedings, and Congress and Supreme Court have historically agreed. *Demore v. Kim*, 538 U.S. 510, 531 (2003) (holding "[d]etention during removal proceedings is a constitutionally permissible part of that process."). As such, DHS's invocation of the automatic stay requiring petitioner's temporary detention pending appeal, in furtherance of a statute requiring petitioner's mandatory detention, is immaterial and cannot violate Due Process.

E. Petitioner's claim that the automatic stay provision is ultra vires lacks merit.

Petitioner claims the automatic stay provision (8 C.F.R. § 1003.19(i)(2)) is ultra vires and exceeds DHS's authority. (Doc. 8 (Amended Petition) at ¶¶77-81.) To the contrary, it is consistent with the delegation of discretionary authority by the Attorney General. *See Samuels v. Chertoff*, 550 F.3d 252, 257 (2d Cir. 2008) (regulation was not ultra vires where it guided the discretion accorded to the Attorney in immigration matters).

"Ultra vires claims are confined to extreme agency error where the agency has stepped so plainly beyond the bounds of its statutory authority, or acted so clearly in

defiance of it, as to warrant the immediate intervention of an equity court." *Fed. Express Corporation v. United States Department of Commerce*, 39 F.4th 756, 764 (D.C. Cir. 2022). Judicial review of ultra vires claims are limited to "where (i) there is no express statutory preclusion of all judicial review; (ii) 'there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory.'" *Id.* (quoting *Nyunt v. Chairman, Broadcasting Board of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)).

In addressing the nature of the automatic stay at issue here, one court has noted that:

> The purpose of the automatic stay provision is to provide a means for DHS to maintain the status quo in those cases where it chooses to seek an expedited review of the IJ's custody order by BIA. 71 Fed. Reg. 57873. To the extent the challenged regulation represents the judgment of the Attorney General as to how best implement the authority granted him by 8 U.S.C. § 1226, judicial review may be barred by § 1226(e). But even if it is not, providing for an automatic stay until the BIA can review the IJ's order for release is not unreasonable. The cases upon which Hussain relies to support his argument that the regulation violates due process addressed the previous regulation under which the duration of the automatic stay was indefinite. *See, e.g., Zavala v. Ridge,* 310 F.Supp.2d 1071, 1075 (N.D.Cal.2004). The current regulation provides that the automatic stay will lapse 90 days after the filing of the notice of appeal. 71 Fed. Reg. 57873, 57874.

Hussain v. Gonzales, 492 F. Supp. 2d 1024, 1031-32 (E.D. Wis. 2007).

When the current regulation was implemented, the Attorney General explained:

> In most cases, an immigration judge's order granting an alien release will result in the alien's release upon the posting of bond or on recognizance, in compliance with the immigration judge's decision. The Attorney General has determined, however, that certain bond cases require additional safeguards before an alien is released during the pendency of removal proceedings against him or her. In these cases, the immigration judge's order is only an interim one, pending review and the exercise of discretion by another of the Attorney General's delegates, the Board. Barring review by the Attorney General, it is the Board's decision that the Attorney General has designated as the final agency action with respect to whether the alien merits bond. Thus, the Attorney General made an operational decision under section 236(a) of the INA with respect to how his discretion should be exercised in a limited class of cases where DHS, which now has independent statutory authority in this area, had sought to detain the alien without bond or with a bond of $10,000 or more and disagrees with the immigration judge's interim custody decision.

Id. (quoting) 75 Fed. Reg. 57873, 80. Accordingly, the "regulation reveals the division of authority the Attorney General has established within the executive branch to exercise his overall authority to determine the custodial status of aliens facing removal proceedings. It is difficult to see how DHS's exercise of its responsibilities within that system operates as a denial of due process." *Hussain*, 492 F. Supp. 2d at 1032. Based on the foregoing, the stay and its invocation in this case is not ultra vires. Rather, it is consistent with the delegation of discretionary authority by the Attorney General. *See Samuels v. Chertoff*, 550 F.3d 252, 257 (2d Cir. 2008) (regulation was not ultra vires where it guided the discretion accorded to the Attorney in immigration matters).

IV. Conclusion

Because this Court lacks jurisdiction over Diallo's Amended Petition, it should dismiss it. Alternatively, because Diallo's temporary detention is lawful, respondents respectfully request that this Court deny his Amended Petition.

Respectfully submitted,

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Date: October 23, 2025

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

YAYA DIALLO,	:	**No. 3:25-CV-1724**
Petitioner	:	
	:	**(Latella, M.J.)**
v.	:	
	:	
CRAIG LOWe, et al.,	:	
Respondents	:	**Filed Electronically**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers. That on October 23, 2025, he served a copy of the attached

RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

by electronic service pursuant to Local Rule 5.7 and Standing Order 05-6, & 12.2 to the following individual(s):

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